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12 **UNITED STATES DISTRICT COURT**

13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

14 WAGGING TAILS PRODUCTIONS,
15 INC., a Delaware corporation,

16 Plaintiff,

17 vs.

18 WILLIAM COAKLEY, an individual,
19 Defendant.

Case No. 2:22-cv-09329-JAK-AFM

Assigned to the Hon. John A. Kronstadt

**PLAINTIFF WAGGING TAILS
PRODUCTIONS, INC.'S
SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
DEFAULT JUDGMENT [ECF 29]
AND RESPONSE TO COURT
ORDER [ECF-31]**

Complaint Filed: December 24, 2022

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SUPPLEMENTAL BRIEF

The Court, by order dated February 21, 2023 [the “Order,” ECF 31], asked plaintiff, Wagging Tails Productions, Inc. (“Wagging Tails”), to address the following issues in connection with its *Ex Parte Application for Temporary Restraining Order and Issuance of Order to Show Cause Re Preliminary Injunction* [the “Application,” ECF 12] and its Motion for Default Judgment and Permanent Injunction [the “MDJ,” ECF 29].

I. GRANTING THE MDJ WOULD MOOT THE APPLICATION

The Application sought temporary relief, to preserve the *status quo* during the pendency of this action. Defendant, William Coakley (“Coakley”), however, allowed entry of default against him, which will lead to entry of judgment sooner than originally anticipated, thereby mooting the Application. This brief therefore addresses the issues raised by the Order as they affect the MDJ under Fed.R.Civ.P. 55 and *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

II. THE CHARACTERS OF *RUNT*, AND THE THEME OF SEXUAL ABUSE, PARALLEL THE CHARACTERS AND THEME IN THE NEW WORK THAT COAKLEY IS ON THE VERGE OF PUBLISHING

Runt used fiction to address the issue of sexual assault in high school. The male lead character, played by Cameron Boyce, witnessed the sexual assault of the female lead character, played by Nicole Berger. After the assault, the plot develops around whether and how the male lead would address the assault. The possibilities ranged from reporting it, to taking matters into his own hands as a vigilante and killing the perpetrator. The film ends ominously, with police sirens.

The new work by Coakley is “strikingly similar” to *Runt*. *Cf.*, *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020). It uses the same characters (played in *Runt* by Boyce and Berger) to convey the same message about abuse. The minor differences are that the abuse occurs on a film set instead of a school, and with Boyce now deceased, Coakley himself takes on the role of vigilante.

1 Indeed, Coakley has written stories about exacting revenge by inducing Nicole
 2 Berger's suicide. The characters, theme, inciting event, and climactic moment all
 3 track the original. Coakley has, in effect, prepared a treatment for his film,
 4 published movie posters, and said his film is in production.

5 The problem for Coakley is that he sold the rights to create a story based on
 6 *Runt*. He does **not** have the right to renege on that sale and create another such story
 7 or screenplay, which he can sell a second time.

8 **III. THE COURT SHOULD ENTER A DEFAULT JUDGMENT**

9 The Order did not address the first *Eitel* factor, or the fourth through the
 10 seventh *Eitel* factors. The Order, however, did analyze issues that go to the second
 11 and third *Eitel* factors, which Wagging Tails addresses below. The Court should
 12 grant the MDJ, because "if the [Complaint] is sufficient, Plaintiffs' substantive
 13 claims have merit for purposes of a request for the entry of a default judgment."
 14 *Twentieth Century Fox v. Riquelme*, 2017 WL 8231046, at *3 (C.D. Cal. Nov. 3,
 15 2017); *ZAG America, LLC v. Harsymets*, 2022 WL2784814, at *4 (C.D. Cal. June
 16 3, 2022).

17 **A. Plaintiff Is Entitled To Declaratory And Injunctive Relief**

18 Wagging Tails' first claim seeks declaratory relief, which was not addressed
 19 in the Application or the Order. In hindsight, however, the Application may have
 20 been better formulated if it had addressed the interplay among the theme of sexual
 21 abuse in the motion picture *Runt*, the certificate of engagement ("CofE"), the
 22 nondisclosure agreement (the "NDA"), and copyright law, as alleged in that claim.

23 The **NDA** addresses ***factual information*** regarding the financing and making
 24 of *Runt*. Coakley agreed to keep confidential "the identities of Producer's ultimate
 25 principals and financiers and all tangible and non-tangible materials in which such
 26 information is contained." [ECF 29-15 (the NDA) at ¶ 2.] After this action was
 27 filed, Coakley published his "Amended Director's Statement," in which he wrote:
 28 "Runt was financed by [names omitted]." [ECF 29-13.] (The brackets in this brief,

1 and redactions in the exhibit, are used to maintain confidentiality consistent with
2 the NDA.) Coakley published the names in breach of the NDA.

3 The CofE addresses Coakley's sale of *creative works*, including the story
4 *Runt* and any work based on *Runt* that Coakley might later create. Such a sale is not
5 unusual in purchasing a story and producing a film, because it gives the purchaser
6 control over sequels and other future, related works by the author. When Coakley
7 sold *Runt*, he also sold "all literary and artistic material of every type and nature
8 written, created, or furnished by [Coakley] in connection with or relating to the
9 Picture as well as the results and proceeds of [Coakley's] services heretofore or
10 hereafter rendered in connection with the Picture." [*Runt*.] [ECF 29-16 (the CofE)
11 at ¶ 2.] Coakley also agreed: "To the extent that any of the Material shall be held
12 not to be a 'work for hire' under the U.S. Copyright Act, [Coakley] hereby
13 irrevocably assigns to [Wagging Tails] the entire copyright and all rights in the
14 Material throughout the world in perpetuity and consent to the further license or
15 assignment of the copyright and any rights contained in the copyright." [*Id.* ¶ 3.] If
16 Coakley had wanted to reserve for himself the right to produce a future story based
17 on or related to the Picture, then he could have sought to negotiate such rights, but
18 he did not. Coakley sold the rights to future works, and Wagging Tails acquired
19 them by contract. Wagging Tails registered the copyright to the text of the story of
20 *Runt* by written agreement, [ECF 29-18]; the motion picture as a work for hire,
21 [ECF 29-19]; and the text of the Director's Statement by written agreement, all
22 pursuant to the CofE [ECF 29-21].

23 **Copyright Law** protects original works of authorship, giving the owner the
24 right to control and exploit those works, including the right to assign the rights to
25 such works. There is no question that Wagging Tails owns the copyright to the
26 movie *Runt* and can control the publication of that work.

27 Here, the NDA, the CofE, and copyright law all converge in the claim for
28 declaratory relief against what Coakley has described as his "new project inspired

1 by the tragic cycle of trauma, grief and abuse that played out during the writing,
 2 production and release of @runtmovie... turning a passion project about the neglect
 3 and mistreatment of kids into a project where kids were used and mistreated.” Thus,
 4 as the Complaint alleges: “An actual controversy has arisen and now exists relating
 5 to the rights and duties of Coakley pursuant to the written Certificate of
 6 Engagement and the NDA, and specifically with respect to what constitutes, and
 7 who would own and control, any Derivative Work or any Additional Director’s
 8 Statement by Coakley.” [ECF 1 (Complaint) ¶ 47.]

9 Coakley uses copyrighted materials from *Runt* to promote his forthcoming
 10 picture, including a movie poster he created using photographs of Cameron Boyce
 11 and Nicole Berger from the original film *Runt*, and to obtain financing for his
 12 forthcoming picture, or in his words “muster some grassroots support to show the
 13 producer who made me the offer.” [See, e.g., ECF 29-10.] Most recently, Coakley
 14 writes that he has made a deal selling his “journey to get RUNT made, last week I
 15 completed and turned over my detailed personal account and initial narrative
 16 contribution that kicks the project in to script phase.” [ECF 29-14.]

17 The undisputed evidence, from Coakley’s own words and pictures,
 18 demonstrates that Coakley created a work based on and related to *Runt*. Wagging
 19 Tails seeks declaratory relief that it has, pursuant to the CofE, the right to register
 20 the copyright of that work because, when Coakley sold *Runt*, he also sold the right
 21 to register the copyright to his future works that relate to *Runt*. To the extent that
 22 work includes factual information protected by the NDA – “the identities of
 23 Producer’s ultimate principals and financiers” – then Wagging Tails is entitled to an
 24 injunction preventing the publication of that information. Declaratory relief is
 25 needed to clarify the contractual duties of the parties with respect to the “new
 26 project.”

27 **B. Plaintiff Is Entitled To Judgment For Anticipatory Breach**

28 The Court’s Order addressed likelihood of success on the claim for

1 anticipatory breach, but the MDJ presents a different question—whether, taking the
2 allegations as true, the Complaint states a claim. The answer is yes.

3 First, the Court indicated, and Wagging Tails agrees, that “[a]n injunction
4 could issue based on a narrow application of the NDA[,]” which “limit[s] the
5 restricted ‘Confidential Information’ to ‘the identities of Producer’s ultimate
6 principals and financiers, to the extent that such identities are revealed to Defendant
7 by the Producer.’” [ECF 31 at 12.]

8 Second, Wagging Tails contends that the NDA, by its terms, also covers
9 other Confidential Information Coakley learned in connection with making *Runt*,
10 such as the use of special effects. This reading of the NDA does not, as the Court
11 previously stated, leave the NDA “vague and overbroad[,]” [ECF 31 at 12], or
12 extend the NDA to “information of any nature that Defendant receives from any
13 person regarding any topic.” *Id.* Rather, this reading limits the NDA to certain
14 nonpublic information Coakley received while working on the set of *Runt*. Coakley
15 agreed to keep that information confidential, but instead he is using it, including the
16 names of the financiers of *Runt*, to make a new project that breaches the NDA.

17 This is not a case like *Denson v. Donald J. Trump for Pres., Inc.*, 530 F.
18 Supp. 3d 412, 433 (S.D.N.Y. 2021), in which the contracting party had “no way of
19 [knowing] what may be disclosed, and . . . not free to speak about anything
20 concerning the Campaign[.]” [See ECF 31, p.12.] To the contrary, the NDA covers
21 specific information, including “the identities of the ultimate principals of Producer
22 and financiers of the Picture,” and information learned on the film set, during
23 production, and “after the execution of [the NDA]” that Coakley learned by hearing
24 or reading the words of others, and by observing events. The NDA does not,
25 however, extend to “information of any nature that Defendant receives from any
26 person regarding any topic.” [ECF 31, p.12.] Rather, it is limited to particular
27 topics. Coakley was free to (and encouraged to) report abuse to the Producers,
28 directly or through a mediator. He had the right to report abuse to authorities.

1 Coakley, however, had no right to disclose Confidential Information, like the
 2 identities of the ultimate financiers of the film, on Instagram or in a new movie.

3 Coakley's claims of abuse do not abrogate Coakley's duties under the NDA.
 4 *See Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-cv-03522-WHO, 2016
 5 U.S. Dist. LEXIS 14485, at *71-72 (N.D. Cal. Feb. 5, 2016) ("Defendants'
 6 purported desire to disclose the NAF recordings to law enforcement does not
 7 obviate the confidentiality agreements for all purposes. At most, defendants might
 8 have a defense to a breach of contract claim based on production of NAF materials
 9 to law enforcement."). Here, Coakley was asked to provide evidence of abuse so
 10 that his claims could be investigated, but he refused to do so. [ECF 1 (Complaint) ¶
 11 23; ECF 19-5 (Berger Decl. of 2/13/2023) ¶ 9.] The inference naturally and readily
 12 follows: Coakley fabricated his allegations for the purpose of funding and creating
 13 a new fictional work based on *Runt*, using the same themes as the story he sold.

14 On Wagging Tails' reading, the NDA would not, as the Court previously
 15 stated, "prohibit[] Defendant from discussing any aspect of the Picture that
 16 [Plaintiff] deems confidential[,] such as "alleged sexual harassment that Defendant
 17 may not have reasonably have anticipated would be covered by the NDA or
 18 disclosed pursuant to the NDA." [ECF 31 at 12.] It is the identity of the ultimate
 19 financiers and filmmaking techniques that are confidential. Coakley's contracts
 20 prevent him from creating a fictionalized account of abuse using *Runt*'s characters,
 21 financiers, and themes. Default judgment should be entered because the allegations
 22 state a claim upon which relief can be granted, *Danning v. Lavine*, 572 F.2d 1386,
 23 1388 (9th Cir. 1978), by "cross[ing] the line from conceivable to plausible."
 24 *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

25 **C. Defendant Has No Meritorious Copyright Defense**

26 **1. Plaintiff Registered The Director Statement And Has The** 27 **Right To Register The Additional Director Statement**

28 *First*, Wagging Tails registered its copyright of the Director's Statement,

1 which establishes a presumption of ownership. Defendant then failed to “offer some
2 evidence or proof” to rebut that presumption. [ECF 31 at 16.] *See, e.g., Novelty
3 Textile, Inc. v. Windsor Fashions, Inc.*, No. CV1205602BROMANX, 2013 WL
4 12114062, at *5 (C.D. Cal. Aug. 21, 2013).

5 *Second*, the Court analyzed the question of whether the Director’s Statement
6 was a work for hire under § 101 of the Copyright Act. Wagging Tails, however,
7 registered the copyright pursuant to a valid *written assignment*. Paragraph 3 of the
8 CofE, says:

9 To the extent that any of the Material shall be held not to be a “work
10 made for hire” under the U.S. Copyright Act, Artist hereby
11 irrevocably assigns to Company the entire copyright and all rights in
12 the Material throughout the world in perpetuity and consent to the
13 further license or assignment of the copyright and any rights
14 contained in the copyright. Company’s rights hereunder shall
15 include the exclusive right to use the Material in the Picture and to
16 own, distribute and otherwise market and exploit the Picture and all
17 components thereof in any manner or media (whether now known or
18 hereafter devised). (Emphasis added)

19 This language constitutes a valid assignment under the Copyright Act of all
20 rights in and to the Material. *See* 17 U.S.C. § 204(a) (“A transfer of copyright
21 ownership, other than by operation of law, is not valid unless an instrument of
22 conveyance, or a note or memorandum of the transfer, is in writing and signed by
23 the owner of the rights conveyed or such owner’s duly authorized agent.”).¹ It is,
24 furthermore, consistent with Wagging Tails’ registration certificate with the U.S.
25 Copyright Office, which states that ownership is based on “written assignment”
26 [see ECF 1-4].

27 “Material” is defined by the CofE as including “all literary and artistic
28 material of every type and nature written, created, or furnished by Artist in
29 connection with or relating to the Picture.” [ECF 1-1, ¶ 1(d).] This definition

¹ Prospective assignments of materials not yet created – as contemplated by the CofE – are commonplace, particularly in the film industry. The Copyright Act does not prohibit such assignments.

1 encompasses the Director's Statement and, by extension, the Additional Director's
 2 Statement, which both clearly constitute "literary" material "in connection with or
 3 relating to the Picture." Indeed, to the extent Defendant ever claimed or claims
 4 otherwise, he would breach the CofE.

5 *Third*, the Director's Statement is a derivative work. Wagging Tails owns the
 6 copyright to the Picture and screenplay. [ECF 1-2, 1-3]]. Defendant's creation and
 7 publication of the Director's Statement and Additional Director's Statement
 8 constitute unauthorized and infringing derivative works of the Picture.

9 A "derivative work" is "a work based upon one or more preexisting works,"
 10 and broadly includes "any other form in which a work may be recast, transformed,
 11 or adapted," including with respect to "annotations, elaborations, or other
 12 modifications which, as a whole, represent an original work of authorship." 17
 13 U.S.C. § 101. These derivative rights encompass related projects such as sequels
 14 and prequels. *See, e.g., Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1112 (9th Cir.
 15 1998) (Copyright owners have "the right to create sequels."); NIMMER ON
 16 COPYRIGHT § 2.12 at 2–178.31 to 2–178.32 (rev. ed. 2009) ("Subsequent works
 17 in a series (or sequels) are in a sense derivative works..."). They naturally extend
 18 to "making of" or "behind-the-scenes" works, such as the Director's Statement,
 19 which discuss Defendant's perspective on the substance, meaning, and message of
 20 the film and his take on what transpired during the creation of the Picture (however
 21 misguided his perspectives may be).

22 Moreover, many of the statements in the Director's Statement are not
 23 "opinions about the Picture and allegations of misconduct . . . behind the scenes."
 24 ECF 31 at 17. They are fictional statements, drawn from and mirroring the themes
 25 of abuse explored in the Picture, using the same characters. In effect, the Director's
 26 Statement is a treatment for Defendant's planned Derivative Work, which
 27 Defendant has told Wagging Tails he is publishing. [*See, e.g.,* ECF 1 at ¶¶ 31-33,
 28 54, 69]. The Additional Director's Statement constitutes a second treatment for this

1 new unauthorized related movie.

2 **2. Defendant Has Not Engaged In Fair Use**

3 The Court stated: “To the extent the Director’s Statement [and presumably,
4 by extension, Additional Director’s Statement] criticize[] the Picture, it would be
5 protected by the fair use doctrine.” ECF 31 at 16. The Court, however, did not
6 address the four-factor test required under 17 U.S.C. § 107: (1) the purpose and
7 character of the use, including whether such use is of a commercial nature or is for
8 nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the
9 amount and substantiality of the portion used in relation to the copyrighted work as
10 a whole; and (4) the effect of the use upon the potential market for or value of the
11 copyrighted work. *See Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1171 (9th Cir.
12 2012). That analysis favors Wagging Tails.

13 Under the first factor, the original and amended Director’s Statements are not
14 transformative of the Picture. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.
15 569, 579 (1994) (purpose of the first factor is to determine whether the alleged
16 infringing work “supersedes the objects” of the original work “or instead adds
17 something new, with a further purpose or different character, altering the first with
18 new expression, meaning, or message”). They purport to tell a story of behind-the-
19 scenes events that mirror the substantive elements and message of the film, using
20 the same characters. They are a pitch for a sequel or a related, behind-the-scenes
21 film, to be created for commercial purposes, *i.e.*, to secure funding. [See ECF 1, ¶
22 38, 49, 69]. These facts weigh heavily against a finding of fair use. *See Harper &*
23 *Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

24 Under the second factor, the underlying copyrighted Picture and screenplay
25 are inherently creative, rather than factual, which disfavors a finding of fair use for
26 an unauthorized derivative work. *See Sega Enterprises Ltd. v. Accolade, Inc.*, 977
27 F.2d 1510, 1524 (9th Cir. 1992).

28 The third factor shows that Defendant used the same characters as the

1 original, and the same themes, as shown by his movie poster.

2 Under the fourth factor, Defendant is impinging on the market for “making
3 of” or “behind-the-scenes” works. Wagging Tails has the exclusive right to make
4 and monetize any such work, or to license third-party producers, writers, and
5 directors to create such works. There is an established market for such works—as
6 evidenced, at least in part, by Defendant’s own repeated statements that he was
7 making such a film [*See, e.g.*, ECF 1, ¶¶ 32-34, 38, 49, 69; ECF 29-14; ECF 29-25].
8 *See, also, McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1163 (9th Cir. 2022)
9 (fourth factor considers adverse impact on potential market for derivative works).

10 **3. Defendant Cannot Profit From The Unauthorized Work**

11 The same analysis applies with equal, if not greater, force to the threatened
12 release of Defendant’s new “making-of-*Runt*” work. [ECF 1, ¶¶ 32-34.]

13 *First*, in the CofE, Coakley assigned his rights to “all literary and artistic
14 material of every type and nature written, created, or furnished by Artist in
15 connection with or relating to the Picture.” Coakley’s new work falls squarely
16 within that definition.

17 *Second*, Coakley’s new work will be a derivative work, a making-of-*Runt*
18 film, “based upon one or more preexisting works,” in a “form in which [*Runt*] may
19 be recast, transformed, or adapted,” including “annotations, elaborations, or other
20 modifications which, as a whole, represent an original work of authorship.” 17
21 U.S.C. § 101. The release of such a movie would infringe Wagging Tails’ rights to
22 create “making of” or “behind-the-scenes” documentaries, and would necessarily
23 incorporate protected elements of the Picture (such as still images/screen shots,
24 short clips, behind-the-scenes footage of the filming process, and/or excerpts from
25 the final Picture or screenplay) to serve its purpose.

26 *Third*, the audiovisual work is likely to incorporate protected elements of the
27 Picture or screenplay. Coakley has already published at least one movie poster
28 using photos from *Runt*, [ECF 29-10], which includes a copyrighted image owned

1 by Wagging Tails of Cameron Boyce and Nicole Berger from *Runt*.

2 *Fourth*, for the reasons stated above, the new film would not constitute fair
3 use.

4 **IV. INJUNCTIVE RELIEF IS WARRANTED**

5 **A. Plaintiff Would Suffer Irreparable Harm Absent An Injunction**

6 The Court questioned Plaintiff's showing of irreparable harm arising from
7 the disclosure of "the identities of the ultimate principals of Producer and financiers
8 of the Picture[.]" ECF 31 at 14 (quoting the NDA), *see id.* at 15 ("Nor does Plaintiff
9 adequately explain what harm it would suffer from such a disclosure[.]"). Such harm
10 arises in two ways:

11 First, disclosure could enable would-be film makers to inundate Wagging
12 Tails and its principals with unsolicited and unwanted requests for money to
13 finance films. The avoidance of such requests provides, in the Court's words, "a
14 protectable business interest after release of the Picture." [ECF 31 at 14.]

15 Second, disclosure could reveal a relationship between the financiers and
16 other film-industry participants, such as actors, directors or producers. Such a
17 relationship could damage the marketability of such participants. For example:
18 Assume that Producer P seeks to hire a director and cast members for a new film.
19 Producer P, however, learns that Actor A and/or Director B work exclusively, or
20 nearly exclusively, on films financed by Financier X. Producer P could then
21 conclude that Actor A and/or Director B lack broad, industry-wide appeal and could
22 then decide not to employ Actor A and/or Director B, which would ultimately harm
23 Wagging Tails and the success of its films.

24 Wagging Tails has a business interest in protecting and promoting the careers
25 of *Runt*'s cast, producer, and others involved. When they flourish, *Runt* attracts
26 more viewers, now and in the future. If they lose marketability or credibility, *Runt*
27 would attract fewer viewers, now and in the future. Such harm extends beyond "the
28 Berger family," [ECF 31 at 14], to Wagging Tails, which, as owner of *Runt*, suffers

1 “related or corresponding harm . . . due to these disclosures.” *Id.*

2 **B. The Relief Sought Does Not Violate Public Policy**

3 The gravamen of the claims in this case is the ownership (and therefore, the
4 right to register) a story about a *fictionalized account* of sexual abuse and acts of
5 revenge and vigilantism related to Cameron Boyce, Nicole Berger, and the movie
6 *Runt*. The Order states that “California has a strong policy against covenants to
7 restrict future sexual harassment and other illegal conduct. New York law also
8 prohibits such covenants.” [ECF 31 at p.11; *see also id.* at 17.] This case, however,
9 implicates no such policy and no restriction of disclosures of factual acts of abuse.
10 There is no evidence of abuse, let alone a coverup. Coakley’s treatment is fiction, as
11 all the witness statements before the Court demonstrate. [*See, e.g.*, ECF 31 at n.8.]

12 Wagging Tails does not dispute that recently enacted laws limit the types of
13 information that can be restricted in settlement agreements. For example, recently
14 amended section 1002(a) of the California Code of Civil Procedure provides that “a
15 provision within a settlement agreement that prevents the disclosure of *factual*
16 *information* related to the action is prohibited in any civil action the *factual*
17 *foundation* for which establishes a cause of action for civil damages for any of the
18 following . . . [sexual abuse].” (Emphasis added.) The NDA, however, is not a
19 settlement agreement, and does not prevent factual disclosures of sexual abuse.

20 Coakley, moreover, was represented by counsel in connection with the CofE.
21 [*See, e.g.*, ECF 12-5 (Bimble Decl.), ¶ 6; ECF 29-4, ¶ 7 (same).] To the extent that
22 the Court considered whether employment law might apply, the Court correctly
23 concluded that it does not.

24 **C. An Injunction Would Not Impose An Impermissible Prior Restraint**

25 The project at issue here involves commercial speech (a movie to be made
26 for profit), which is misleading (in that it tells a purported story about the making of
27 *Runt* that is a fictionalized mirror of the movie). Commercial speech receives
28 “lesser protection . . . than . . . other constitutionally guaranteed expression. . . .

1 [T]here can be no constitutional objection to the suppression of commercial
 2 messages that do not accurately inform the public about lawful activity. The
 3 government may ban forms of communication more likely to deceive the public
 4 than to inform it. . . .” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447
 5 U.S. 557, 562-63 (1980) (internal citations omitted).

6 Misleading speech may also be enjoined under California’s unfair
 7 competition law, Cal. Bus. & Prof. Code § 17200 et seq. (the “UCL”), whether or
 8 not the business practice violates any other law. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939,
 9 949-50. Coakley’s message is misleading, because it is a fictionalized account of
 10 abuse and vigilantism that mirrors the themes of *Runt* but will be presented as fact.

11 Similarly, defamatory speech can be enjoined. *See, e.g., Balboa Island Vill.*
 12 *Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1155-56 (2007) (“[W]e hold that, following a
 13 trial at which it is determined that the defendant defamed the plaintiff, the court
 14 may issue an injunction prohibiting the defendant from repeating the statements
 15 determined to be defamatory.”) Accordingly, “once a court has found that a specific
 16 pattern of speech is unlawful, an injunctive order prohibiting the repetition,
 17 perpetuation, or continuation of that practice is not a prohibited ‘prior restraint’ of
 18 speech.” *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 140 (1999).

19 Here, the only evidence in the record shows that there was no abuse on the
 20 set. Coakley has not appeared to challenge that evidence. The First Amendment
 21 establishes no bar against an injunction preventing Coakley from using the same
 22 themes and same characters as in *Runt*, and their photographs, in his new project. It
 23 is misleading, and the First Amendment does not protect speech that is “likely to
 24 deceive.” *In re R. M. J.*, 455 U.S. 191, 202, 102 S. Ct. 929, 937 (1982).

25 Coakley, moreover, waived any First Amendment rights. “[W]here parties to
 26 a contract [here, the NDA and CofE] agree to restrictions on speech, those
 27 restrictions are generally upheld.” *Nat’l Abortion Fed’n* at *59. An “NDA is not a
 28 restriction on speech at all, but a waiver of [the party’s] right to disseminate or

1 speak about” certain information. *Ostergren v. Frick*, No. 1:19-cv-139, 2020 U.S.
 2 Dist. LEXIS 54699, at *17 (W.D. Mich. Mar. 30, 2020). “That a confidentiality
 3 provision is broad does not mean it is unenforceable.” *Nat’l Abortion Fed’n*, at *49.

4 Here, in the NDA and CofE, Coakley waived any First Amendment rights
 5 that he may have otherwise had to identify the financiers of *Runt*, and to disclose
 6 special effects used in the making of the film, and he agreed that Wagging Tails
 7 may register the copyright of a work by Coakley based on *Runt*. Rights like those
 8 are typically addressed in contracts for creative works like movies:

9 In *In re Steinberg*, 148 Cal.App.3d 14, 20 (1983), the court
 10 recognized that a movie maker had a First Amendment right to
 11 disseminate his movie, but that this right was limited by his
 12 agreement to submit the final version of the movie to the juvenile
 13 court for editing. In *Erie Telecommunications, Inc. v. City of Erie*,
 14 Pa., 853 F.2d 1084, 1094-1101 (3d Cir. 1988) a cable television
 franchisee was held under federal law to have voluntarily,
 knowingly, and intelligently waived its First Amendment rights by
 an agreement with the franchisor.

15 *ITT Telecom Prods. Corp. v. Dooley*, 214 Cal. App. 3d 307, 319 (1989).

16 Here, too, Coakley has contractually agreed to be bound by the NDA and the
 17 CofE. To the extent that Coakley would otherwise have had a free speech right to
 18 disclose information about the financing of *Runt*, he waived it when he signed the
 19 NDA. To the extent that Coakley otherwise had a right to create a fictional story of
 20 abuse on the set of the making of a movie, he sold that story through the CofE.

21 If Coakley really had evidence of unlawful activities on the set of *Runt*,
 22 Wagging Tails would have no objection to Coakley disclosing it to the appropriate
 23 authorities, and has repeatedly encouraged him to do so. In the years since the
 24 film’s release, however, Coakley has never done that, which warrants the strong
 25 inference that he has no such information and is merely creating a fictional
 26 commercial work. “Defendants’ purported desire to disclose [certain] recordings to
 27 law enforcement does not obviate the confidentiality agreements for all purposes.
 28 At most, defendants might have a defense to a breach of contract claim based on

1 production of [those] materials to law enforcement.” *Nat’l Abortion Fed.* at *71-72.
 2 Permitting disclosures of factual allegations of abuse to the authorities would serve
 3 the public interest, while holding Coakley to his contractual agreements. *Cf. Cohen*
 4 *v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (“the First Amendment does not
 5 confer on the press a constitutional right to disregard promises that would otherwise
 6 be enforced under state law.”).

7 Finally, Coakley has no First Amendment right that trumps Wagging Tails’
 8 rights under the Copyright Act, which, through the fair use doctrine, provides a
 9 built-in First Amendment safety valve. *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d
 10 1004, 1028 (9th Cir. 2001). Therefore, “uses of copyrighted material that are not
 11 fair uses are rightfully enjoined.” *Id.* (citing *Dr. Seuss Enters. v. Penguin Books*
 12 *USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir.1997) (rejecting contention that injunction
 13 would constitute a prior restraint in violation of First Amendment)).

14 Wagging Tails, furthermore, never sought a “prospective, perpetual waiver”
 15 of all of Defendant’s First Amendment rights, or to ensure “silence” relating to the
 16 Picture. [ECF 31 at 16.] Nor did Wagging Tails ask Defendant to waive his rights
 17 under the fair use doctrine. Wagging Tails seeks merely to enforce the NDA and its
 18 exclusive ownership rights, arising under contract and copyright laws, in and to the
 19 Picture and derivatives thereof.

20 **V. CONCLUSION**

21 For the foregoing reasons, Wagging Tails respectfully requests that the Court
 22 grant the MDJ in its entirety. If the Court finds that the MDJ cannot be granted,
 23 then Wagging Tails requests leave to amend the Complaint and/or to respond to any
 24 additional issues raised by the Court.

25 DATED: February 28, 2023 BLANK ROME LLP

26 By: /s/ Jeffrey Rosenfeld
 27 Jeffrey Rosenfeld
 28 Attorneys for Plaintiff
 Wagging Tails Productions, Inc.

